LIBRARY
SUPREME COURT. U.S.

Office - Supreme Court, U. S.
OCT 15 1954
LEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

No. 20

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Petitioner,

—against—

WILLIAM DIXON, *et al.*, as members of the Board of Education of the City of Yonkers, etc.,

Respondents.

ON A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

REPLY BRIEF OF PETITIONER

EMANUEL REDFIELD,
Counsel for Petitioner.

12 CASE PRESS, 30 Ferry Street, N. Y. C.—COrtlandt 7-0484-0485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 20

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Petitioner,

—against—

WILLIAM DIXON, *et al.*, as members of the Board of Education of the City of Yonkers, etc.,

Respondents.

ON A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

REPLY BRIEF OF PETITIONER

This brief is a reply to both the brief of the respondents and of the *amicus curiae.*

Respondents' brief in answer to the merits of the argument is (p. 4, its brief): "Without doubt members of a board in a school district know the sentiment of the taxpayers and voters of the school district in which they serve and, as pointed out by the Court (R. fols. 45-46), may find, even if the proposed use is itself legitimate, that the sentiment of the community is divided as to the propriety of the use and may properly refuse a request, the granting of which would result in dissatisfaction and criticism."

Assuming that the law in New York can be so construed, such construction would still run afoul of constitutional requirements of clarity (*Winters* v. *New York, supra*). Such construction does not state how "community sentiment" is to be discovered. Is the vociferous objection of a few to be considered "community sentiment?" This Court has not yet considered noise as a substitute for the establishment of truth. Nor does such constructions answer the other objections in the Brief of the Petitioner.

As to the other mention in the Brief of Respondents as to the effect of its failure to deny the allegations of the petition sufficient response is found in *Joint Anti-Fascist Refugee Committee* v. *J. Howard McGrath,* 341 U. S. 123, 126, where it was held: "We conclude that, if *the allegations of the complaint are taken as true* (as they must be on the motions to dismiss) * * *" See also Respondents' own citation *High* v. *Board of Education,* 169 Misc. 98, aff'd 256 App. Div. 1074, aff'd 281 N. Y. 815, that for the purposes of a motion to dismiss, all the allegations of the petition are deemed true.

What seems to bother the Respondents is that they have not yet had an opportunity to answer the petition and furthermore, a direction by way of mandamus cannot be made by this Court. This doubt can be laid to rest by petitioner's request for relief in his brief, *i.e.,* that this Court reverse the order below, and remand same to conform with this Court's decision. Thus, the Respondents will have an ample opportunity to answer. This is fundamental procedure, and was so done in the *Anti-Fascist Committee* case, *supra.*

Reply to the Brief of *Amicus Curiae*

Taking Point II of the *amicus* brief first, the answers are as follows:

1. It is argued, that the attack upon the Regulation of the Respondents is not appropriate in this Court because, so it says, it was not raised in the lower Courts. Aside from the doubtful appropriateness of an *amicus* to inject questions, not related to the merits, since this Court's pronouncement in *Julius Rosenberg* v. *United States,* 346 U. S. 271, nevertheless,

(a) Even if the issue of the validity of the Regulation of the Respondents had not been raised below, there still remains before the Court

(i) The question of unconstitutional application of the state law, Section 414 Education Law, both in discriminating against the Petitioner and in applying it without any standards.

(ii) The validity of the Regulation was raised and is embraced in the broad allegations of the petition (R. fol. 33, 34) and in the broad "Specification of Errors to be Urged" p. 8, "Petition for a Writ of Certiorari". The making of the Regulation is an act of the Respondents which is, in any event, a part of the conduct complained of.

What the *amicus* really objects to is that Petitioner's Brief here is more specific, more carefully prepared and more articulate. We are hopeful that the Court does not look upon such effort with disfavor.

(b) As to the argument that the appeal should have been made to the Commissioner of Education, touching

only on this question of the validity of the Regulation, the answers are three:

(i) The Appellate Division held in this case (Brief of Petitioner, p. 39) that an appeal to the courts is an appropriate remedy. Its decision was compelling in face of the State decisions cited on pages 3 and 4 of Brief of Petitioner.

(ii) The decisions of this Court, cited on page 3 of Brief of Petitioner, particularly the *Ben Avon* case, hold that a denial of a constitutional right cannot be shielded by a denial of review by the Courts. The New York law clearly states that once an appeal is taken to the Commissioner of Education, it is final and no review can be had in the Courts. Section 310 Education Law, in Appendix A of *amicus'* brief. *Chapin* v. *Board of Education,* 291 N. Y. 241. How is a citizen to have his constitutional rights protected if he is to meet a dead end on the avenue to a review?

(iii) In any case, the *amicus'* argument is addressed to instances where an attack is made on the Regulation only. There still remains before the Court, the challenges presented here of the unconstitutional application of the law to this Petitioner. So that even if merit (as well as appropriateness) is found in the contention of the *amicus* that the attack on the validity of the Regulation of the Respondent may only be by appeal to the Commissioner, despite the decision of the Appellate Division to the contrary, nevertheless, there is still before the Court, without dispute, the question of the unconstitutional application of the law.

2. It is argued by the *amicus* that this Court should not pass upon this question until after a construction is made by the Courts of New York. The reply is as follows:

(a) The State Courts have construed this law and have passed upon the actions of the Respondents. See, opinions of Special Term and of the Appellate Division. If the Court of Appeals did not construe the law, it is because it refused to pass upon the question. A similar situation is found in the *Niemotko* case. This Court did not refuse to review or pass upon the denial of free speech there, because the highest Court of Maryland refused to review. This Court passed upon the actions of the lower Courts and the public officers who had denied, arbitrarily, the right to use a public place for speech.

(b) In any event, the Commissioner of Education has construed the statute exactly as the Respondents did, that there is unlimited discretion. (*Matter of Mauersberger*, p. 27 of brief of *amicus curiae*.)

(c) If the *amicus* argument were to be accepted that Petitioner has to wait for a construction by the highest Court then this Petitioner would be without a remedy, even though it is plain that his rights have been infringed.

(d) In any event, the statute and Regulation are plain, but infirm against constitutional challenge. What was done here is perfectly clear, and is admitted both by Brief of Respondents and at Special Term, to wit, that the Petitioner was denied the use of the premises because of the

controversial nature of Petitioner's organization and the subject of speech (R. fol. 49).

3. As to Point I of the *amicus*, it is only fair to state that the matter has been covered in Brief of Petitioner, to which reference is made as to what Petitioner actually argues. Only a word should be added about the *Danskin* case. It was a much stronger case for the school board than this one. There, the objection was based upon a refusal of the applicant to take a test oath. Here, there is no such problem. Petitioner took special pains in Brief of Petitioner, p. 17, last line, to state, "Justice Carter who concurred stated the following *which seems more pointed toward a determination of the issues in this case*". Then follows a statement of principles that are applicable to this appeal.

Respec ully submitted,

EMANUEL REDFIELD,
Counsel for Petitioner.